

Memorandum

Date: June 26, 2002

To: California Water Plan Advisory Committee Members

From: John Kramer, Staff Counsel
Department of Water Resources

J Kramer 6/26/02

Subject: Bagley-Keene Open Meeting Act

The Bagley-Keene Open Meeting Act requires that state boards, commissions and similar multimember bodies conduct their business in open, noticed public meetings. It is similar to the Brown Act, which applies to cities, counties, and other local public agencies. Both laws guarantee the public's right to attend and participate in meetings of public multimember bodies. They require that discussion, deliberation and debate that lead to a decision be conducted in open, noticed meetings. The Bagley-Keene Act is contained in Section 11120 *et seq.* of the Government Code. The entire act and a table of contents can be found at <http://caag.state.ca.us/publications/bagleykeene.pdf>. Copies of the Act have been distributed to Advisory Committee members, and each member should take the time necessary to become familiar with the Act's requirements.

The Bagley-Keene Act's definition of a "state body" to which the Act applies was recently amended. A "state body" now is defined as "Every state board, commission, or similar multimember body of the state that is *created by statute or required by law to conduct official meetings* and every commission created by executive order." (Govt. Code § 11121(a)). Water Code Section 10004(b)(2) requires the Department of Water Resources to establish an Advisory Committee of specified membership, and it requires that the meetings be noticed and the meetings be open to the public. Thus, the Advisory Committee is subject to the Bagley-Keene Act.

Matters which are to be considered by a state body must be noticed and posted at least ten days before the meeting, and an agenda of the meeting must be posted which provides a brief general description of each item to be discussed or considered at the meeting. (§§ 11125, 11125.1) The purpose of the agenda is to inform interested members of the public about the subject matter under consideration so that they can decide whether to attend and participate in the meeting.

The Bagley-Keene Act not only requires that matters be considered in open, noticed meetings; it also expressly prohibits serial meetings. A serial meeting is generally a series of communications among members about matters which will or may come up on a future agenda, each of which communication involves less than a quorum, but which collectively involve a majority of the body's members. The Bagley-Keene Act was recently amended to make the prohibition of serial meetings explicit, and to make the prohibition virtually identical to the Brown Act. Government Code Section 11122.5(b) now reads:

"(b) Except as authorized pursuant to Section 11123, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body is prohibited."

Section 11123 deals with teleconference meetings, where some members of a state body may attend by teleconference, so long as there is at least one open, noticed, physical meeting place where the public may attend.

Section 11122.5(b) prohibits communications which might aid in developing a "collective concurrence" among a majority of members of a state body. The sort of communications which may result in a collective concurrence include things like substantive conversations among members concerning an agenda item or conversations which contribute to the members understanding of an issue or conversations leading to a compromise on current or potential agenda items. A serial meeting can occur when the conversations are among the members, or if they are with staff, where the staff shares such substantive information among a majority of the members. Serial meetings can also occur where e-mails about such substantive matters are shared among a majority.

Responsibility for compliance with the Act rests with each member of a multimember state body. Actions taken in violation of the Act's requirements can be declared null and void by a court, and the Attorney General, District attorneys or interested persons may commence such a legal action (§§ 11130-11130.3). Violation of the Act can also be a misdemeanor where the members intend to deprive the public of information to which they are entitled (§ 11130.7)

Because of the serial meeting prohibition, the Department has decided to avoid utilizing an e-mail reflector because it could have the effect of sharing a member's communication among all Committee members. While all reflected communications may not amount to a serial meeting, an abundance of caution and recognition of the purpose of the Act's serial meeting prohibition informs a decision to avoid reflecting member e-mails to the entire Committee. Staff can and will continue to communicate with Committee members about matters which do not have the effect of developing a collective concurrence among a majority of the members, such as scheduling, soliciting agenda items, discussing meeting locations and timing, etc. However, staff will avoid communications that have the effect of seeking or developing consensus among a majority of Committee members, or other communications which may result in a serial meeting prohibited by Section 11122.5(b).

If you have any questions, please feel free to contact Scott Morgan or John Kramer with the Department's legal staff. Scott Morgan can be contacted at smorgan@water.ca.gov or (916) 653-1210. John Kramer can be contacted at jkramer@water.ca.gov or (916) 653-5137.